Supreme Court, U.S.
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No. 09-1280

IN THE

Supreme Court of the United States

DOMINIC BARAGONA, *et al.*,

Petitioners,

v.

KUWAIT GULF LINK TRANSPORT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a district court may set aside as void a default judgment against a foreign defendant pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure based on a finding on undisputed evidence that the defendant lacks any minimum contacts with the forum.

Whether a defendant that lacks any minimum contacts with the forum waives its defense of lack of personal jurisdiction by not voluntarily appearing in the district court prior to the entry of judgment.

DISCLOSURE STATEMENT

Respondent Kuwait & Gulf Link Transport Company (erroneously called Kuwait Gulf Link Transport Company in the case caption) has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

In its brief opinion below, the court of appeals affirmed the district court's order vacating a default judgment against Respondent Kuwait & Gulf Link Transport Company ("KGL") on the ground that the court lacked personal jurisdiction over KGL, a company incorporated under Kuwaiti law with its principal place of business in Kuwait. Pet. App. 1a-7a. That ruling was made on the basis of undisputed evidence that KGL did not have any contacts with the State of Georgia, the forum state in which Petitioners brought suit against it. The Petition contains an incomplete account of the pertinent undisputed facts.

A. The District Court's Initial Jurisdictional Finding And Default Judgment.

On May 12, 2005, Petitioners filed suit against KGL under Georgia tort law in the United States District Court for the Northern District of Georgia. Pet. App. 2a, 11a. Petitioners alleged claims for negligence and wrongful death arising from a vehicle accident in Iraq. *Id.* at 11a. Petitioners asserted the district court had diversity jurisdiction over the action and personal jurisdiction over KGL under Georgia's long-arm statute. *Id.* KGL, which is incorporated under Kuwaiti law and has its principal place of business in Kuwait, declined to answer the complaint or otherwise appear in the district court. *Id.* at 9a.

From the outset, the district court was concerned about whether it had personal jurisdiction over a Kuwaiti company for an action based on an accident in Iraq. *Id.* It therefore required Petitioners to present evidence to support the scope and nature of KGL's contacts with the United States, and with Georgia in particular. *Id.*

At an evidentiary hearing held "without the benefit of input or counter-evidence from KGL" (*id.*), Petitioners submitted a declaration of a retired United States Army contracting officer whom they identified as a contracting expert. *Id.* at 13a. That witness asserted that the contracting office for the Third United States Army was headquartered at Fort McPherson in Atlanta, Georgia. *Id.* at 13a. He explained that the Third Army is the Army Component of the United States Central Command, the joint forces command responsible for the Middle East region. *Id.* Petitioners also submitted a spreadsheet purporting to identify over one hundred contracts entered into between KGL and the "U.S. Army Central Cmd—Kuwait." *Id.* at 13a, 32a & n.32. Petitioners' witness asserted that each of those contracts would have been administered by the Army at Fort McPherson, Georgia. *Id.* at 13a.

Based solely on that evidence—which later turned out to be mistaken—the district court determined that Petitioners had made a *prima facie* showing that it had personal jurisdiction over KGL. *Id.* at 9a, 13a.

In November 2007, after entry of default against KGL and a hearing on damages, the district court entered a default judgment against KGL in the amount of more than $4.9 million. *Id.* at 3a, 9a, 13a.

B. KGL's Motion To Set Aside The Default Judgment And The District Court's Findings.

On February 15, 2008, KGL moved under Rule 60(b)(4) of the Federal Rules of Civil Procedure for relief from the judgment on the ground that KGL did not have sufficient contacts with the district or with the United States generally for the court to exercise jurisdiction over it. *Id.* at 9a-10a. The district court determined there was a material conflict between the evidence presented by KGL and that previously presented by Petitioners regarding KGL's contacts with the State of Georgia, and permitted Petitioners to conduct discovery directed at the jurisdictional issue. *Id.* at 10a, 14a. It then held a seven-hour evidentiary hearing at which both parties were given the opportunity to present testimonial and documentary evidence. *Id.* at 10a, 14a.

KGL presented three witnesses, including its former operations manager who had been responsible for administering KGL's contracts with the U.S. Army, an in-house attorney who had surveyed all of KGL's employees in Kuwait regarding their contacts with the United States, and the chief operating officer and vice chairman of a corporate subsidiary, who testified regarding the company's contacts with the United States. *Id.* at 24a-28a. It also introduced into evidence sixteen separate contracts with the United States Government with effective award dates between 1995 and 2004. *Id.* at 23a. Every contract introduced into evidence was issued by a U.S. Government organization outside the United States, was to be performed in the Middle East, required KGL to submit its invoices in Kuwait, and contemplated payment from U.S.

Government finance offices in Kuwait; none contained any reference to Fort McPherson or to Georgia generally. *Id.* at 23a-24a.

At the hearing, the expert retained by Petitioners, upon whose declaration the district court had previously relied when it found a *prima facie* showing of jurisdiction, also testified. *Id.* at 28a. Significantly, that witness "conceded the absence of KGL's contacts" with the forum. *Id.* at 10a. The witness explained that his prior declaration had been based on his three-year tour of duty at Fort McPherson in the 1980s and on general Internet research—a "limited basis" the district court observed "was not previously made clear to the Court." *Id.* at 28a & n.12. The witness admitted that he "was in error" when he stated in his earlier sworn declaration that the Third Army's responsible contracting office was located at all times in Fort McPherson, Georgia, and that in fact, the Army's contracting component had moved its headquarters from Fort McPherson to Kuwait in late 2001, long before the vehicle accident occurred in May 2003. *Id.* at 32a. As for the spreadsheet that the witness had interpreted as showing over a hundred different contracts between KGL and the U.S. Army, the court found on "[c]loser examination" that most of those entries related to the performance of a single contract. *Id.* at 32a n.13. The district court concluded that the prior testimony offered by Petitioners' expert "was based on scant investigation, personal experiences that were not coextensive with the relevant time period in this case, and beliefs about the constitutional exercise of personal jurisdiction that are in conflict with applicable legal precedent and logic." *Id.* at 31a.

Based on the evidence presented at the hearing, the district court found that KGL's contacts with the United States Army were exclusively military contracts for transportation services in Kuwait. *Id.* at 31a. The evidence showed that all of those contracts were negotiated and executed in Kuwait, that all services were performed in Kuwait, and that all payment was made from Kuwait to KGL's accounts in Kuwait. *Id.*

In short, the district court found that the evidence presented at the hearing supported "KGL's general assertion that it does not have any contacts with Georgia." *Id.* at 33a. Indeed, the district court found that "[Petitioners] have not been able to identify anything or anyone connecting KGL to Georgia." *Id.* To the contrary, "the expanded record now shows that KGL's contacts with Georgia are nonexistent or *de minimis* at best." *Id.* at 36a (footnote omitted); *see also id.* at n.14 (court determined that KGL has "essentially no contact" with Georgia). Explaining that the hearing had provided the court with "a more complete and accurate description" of KGL's contacts with the forum than Petitioners previously had provided, the district court ruled that there was no basis for it to assert personal jurisdiction over KGL, and granted KGL's motion to vacate the default judgment against it. *Id.* at 10a, 49a.

C. The Court of Appeals' Decision.

In a brief per curiam opinion, the Eleventh Circuit affirmed. Pet. App. 1a-7a. The court first addressed Petitioners' contention that KGL had waived its right to contest personal jurisdiction by waiting to raise the

issue until after a default judgment was rendered against it. *Id.* at 4a. As the court explained (*id.*), that argument is irreconcilable with this Court's recognition in *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982), that a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Petitioners' other waiver arguments were based principally on cases involving improper or defective service of process. *Id.* at 5a. As the court explained, however, those cases hold only that a defendant with notice of an action who ignores defective service waives the defense of improper service of process. *Id.* They do not hold that a defendant waives a defense of lack of personal jurisdiction when it receives notice of an action, since the Constitution imposes the separate requirement that a defendant have minimum contacts with the forum so as to render it amenable to jurisdiction. *Id.*

REASONS FOR DENYING THE PETITION

Petitioners seek certiorari on the premise that the lower courts are in "disarray" over the "important question" of the circumstances under which Rule 60(b)(4) of the Federal Rules of Civil Procedure permits a district court to vacate a judgment for lack of personal jurisdiction over the defendant. Pet. 8-9. In fact, there is no such conflict. Petitioners admit at the outset that "the majority of lower court authorities are in accord with the decision of the court of appeals below." *Id.* at 8. Indeed, every federal circuit to have addressed the issue holds that a nonresident defendant with notice of an action against it may decline to appear and later

move under Rule 60(b)(4) to set aside a judgment entered without personal jurisdiction over it. *See id.* at 22 (recognizing that "[n]umerous lower courts . . . have also found that the judgment of a court lacking personal jurisdiction over a defendant is always void, as did the Eleventh Circuit below, and the district court therefore has a nondiscretionary duty to vacate the judgment"). Petitioners do not cite a single case that holds otherwise, and to our knowledge, there is none.

Nor does this case present any important question of federal law. Rather, it involves nothing more than a straightforward application of Rule 60(b)(4), which by its plain terms authorizes a district court to set aside a void judgment, such as one rendered without personal jurisdiction over the defendant. Petitioners do not dispute the district court's finding that it lacked personal jurisdiction over Respondent KGL. They do not dispute that Rule 60(b)(4) allows a defendant to challenge the court's personal jurisdiction after entry of a default judgment. Petitioners' assertion that this procedural mechanism is at odds with the rule that a court has jurisdiction to determine its own jurisdiction simply ignores the distinction between a defendant who voluntarily appears and pleads under Rule 12, and one who does not. Petitioners' theory that notice of a pending action alone is sufficient to establish personal jurisdiction is directly contrary to this Court's authority, and finds no support in this Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010).

I.

THERE IS NO CONFLICT AMONG THE LOWER COURTS OR OTHER GROUND WARRANTING CERTIORARI.

"The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Unlike subject matter jurisdiction, which is an Article III and statutory requirement, "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 702 (footnote omitted). The test for personal jurisdiction requires that the defendant must have minimum contacts with the forum state, and that the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Rule 60(b)(4) of the Federal Rules of Civil Procedure permits a defendant to move for relief from a final judgment on the ground that the judgment is void. FED. R. CIV. P. 60(b)(4); *Klapprott v. United States*, 335 U.S. 601, 609 (1949). A judgment entered without personal jurisdiction over the defendant violates the Due Process Clause of the Fourteenth Amendment, rendering it void. *E.g.*, *Burnham v. Superior Court*, 495 U.S. 604, 608-09 (1990). This jurisdictional principle is so fundamental that there is no time limit on an attack on a judgment as void, because such a judgment cannot

acquire validity through the passage of time. *See Klapprott*, 335 U.S. at 609 (a court may "set aside a 'void judgment' without regard to the limitation of a year applicable to motions to set aside on some other grounds"); *Jackson v. FIE Corp.*, 302 F.3d 515, 523 n.23 (5th Cir. 2002).

Here, the court of appeals' decision applying these principles is entirely consistent with settled law, and does not present any grounds for certiorari.

A. It Is Settled Law That A Defendant May Always Move Under Rule 60(b)(4) To Vacate A Default Judgment For Lack Of Personal Jurisdiction.

"A defendant who knows of an action but believes the court lacks jurisdiction over his person or over the subject matter generally has an election." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987). First, a defendant may appear in the trial court and move to dismiss under Rule 12(b)(2). *Id.* Alternatively, a defendant may decline to appear, allow the entry of a default judgment, and later move under Rule 60(b)(4) for relief from the judgment as void for lack of jurisdiction. *Id.*

The Federal Rules express no preference between the two. This Court has unambiguously held that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 706

(1982) ("*Insurance Corp. of Ireland*"); *see also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) ("[defendant] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment . . . [defendant] could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction"). As a result, courts routinely vacate default judgments for lack of personal jurisdiction over foreign defendants who, although aware of the proceedings, declined to appear and move to dismiss under Rule 12(b). *See, e.g.*, *Foster v. Arletty 3 S.A.R.L.*, 278 F.3d 409, 413 (4th Cir. 2002) (vacating default judgment against French defendant for lack of personal jurisdiction); *Thos P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (vacating default judgment against Costa Rican defendant for lack of personal jurisdiction); *see also* cases cited, Pet. 22.

Petitioners have no basis to denigrate as mere dicta the rule set forth in *Insurance Corp. of Ireland*. Pet. 11-12. The rule is entirely consistent with the Court's earlier decision in *Baldwin*, and is grounded in bedrock principles of individual liberty, which recognize that the judgment of a court lacking personal jurisdiction is void. Indeed, the rule is so uncontroversial that every circuit court to address the issue has either followed, or independently arrived at a conclusion consistent with, this Court's opinion in *Insurance Corp. of Ireland*. *See, e.g.*, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2nd Cir. 1998) (quoting *Insurance Corp. of Ireland*, 456 U.S. at 706); *Budget Blinds, Inc. v. White*, 536 F.3d 244, 260 (3rd Cir. 2008)

(same); *Foster*, 278 F.3d at 413 (same); *MCI Telecoms. Corp. v. Alhadhood*, 82 F.3d 658, 662 (5th Cir. 1996) (same); *United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004) (same); *Practical Concepts, Inc.*, 811 F.2d at 1547 (same); *Ganis Corp. of California v. Jackson*, 822 F.2d 194, 196 (1st Cir. 1987) (district court properly heard motion to set aside judgment for lack of personal jurisdiction where defendant knew of action but did not appear); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1113 (6th Cir. 1994) (same); *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1034 (7th Cir. 2000) (same); *Thos P. Gonzalez Corp.*, 614 F.2d at 1256 (same); *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 924 (11th Cir. 2007) (same).

In short, the Eleventh Circuit's decision below is consistent with the overwhelming weight of authority. There is no conflict among the lower courts that could warrant review by this Court.

B. Setting Aside Judgments That Are Void For Lack Of Personal Jurisdiction Does Not Conflict With The Rule That A Court May Determine Its Own Jurisdiction When A Party Voluntarily Appears.

Petitioners assert that this Court's decision in *Insurance Corp. of Ireland* has sown "confusion" among the lower courts because, in Petitioners' view, the nondiscretionary duty to vacate judgments for lack of personal jurisdiction contradicts the rule that a court may determine its own jurisdiction, and that such determinations—"even if erroneous"—are res judicata. Pet. 8, 11. They contend further that there is no

corresponding duty where subject matter jurisdiction is concerned, leading to disparate results depending on the nature of the jurisdictional defense. *Id.* at 21-22. Petitioners' claims are groundless.

As to the only issue presented below—the availability of relief for lack of personal jurisdiction—Petitioners cite no case holding that a party lacking minimum contacts with a forum who declines to appear in an action against it may be barred on res judicata grounds from later raising a jurisdictional defense. That result would be flatly inconsistent with the rule in *Insurance Corp. of Ireland* and *Baldwin*. Moreover, as the instant case clearly demonstrates, giving res judicata effect to a district court's initial jurisdictional finding, made without the benefit of the defendant's input, would risk "erroneous" (Pet. 11) results based on mistaken evidence of the defendant's supposed contacts with the forum.

As to their claim of "disparate treatment" for subject matter jurisdiction, which was not at issue below, Petitioners' own authorities establish that the "nondiscretionary duty" to vacate void judgments applies *regardless* of the nature of the jurisdictional defect. *See, e.g., Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985) (holding courts have "no discretion" in determining whether to set aside a judgment that is void for lack of subject matter jurisdiction); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982) (same).

Contrary to Petitioners' theory, res judicata turns on whether the movant voluntarily appeared in the district court to contest its jurisdiction prior to

judgment, not on the nature of the jurisdictional defense at issue. If a defendant appears and submits to the court's jurisdiction "for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings." *Insurance Corp. of Ireland*, 456 U.S. at 706. By the same token, a court's determination that it has jurisdiction of the subject matter is binding on that issue if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject-matter jurisdiction and failed to do so. *Durfee v. Duke*, 375 U.S. 106, 112 (1963); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

Petitioners' own authorities illustrate this rule. Nearly all of the cases Petitioners cite for their theory that subject matter jurisdiction is treated differently under Rule 60(b)(4) involved parties who voluntarily appeared in the initial proceedings, making a later collateral attack improper. Pet. 21.[1] Conversely, nearly

[1] *See Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 206 (5th Cir. 2003); *United States v. Tittjung*, 235 F.3d 330, 335-36 (7th Cir. 2000); *Nemaizer v. Baker*, 793 F.2d 58, 60 (2nd Cir. 1986); *Honneus*, 691 F.2d at 2; *Kansas City S. R. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 823 (8th Cir. 1980); *Lubben v. Selective Serv. Sys. Local Bd.*, 453 F.2d 645, 647 (1st Cir. 1972); *but see Watts*, 752 F.2d at 410 (affirming vacatur where movant appeared in initial proceedings on ground that Rule 60(b)(4) motion was a direct attack on void judgment). Petitioners also rely on *Raymark Indus., Inc. v. Lai*, 973 F.2d 1125 (3rd Cir. 1992), which did not involve a motion under Rule 60(b)(4) and is therefore inapposite.

all of the cases Petitioners cite addressing a defect in personal jurisdiction involved parties who did *not* appear in the initial proceedings, thereby preserving their right to raise the issue under Rule 60(b)(4). *Id.* at 22.[2]

Petitioners erroneously suggest that lower courts have departed from the *Insurance Corp. of Ireland* rule. Pet. 23. Not so. In one of the cases cited by Petitioners, the defendants were denied relief under Rule 60(b) because they had already unsuccessfully litigated the jurisdictional defense by appearing and filing a motion to dismiss under Rule 12(b)(2)—an outcome that is perfectly consistent with the general rule. *In re Universal Display & Sign Co.*, 541 F.2d 142, 143-44 (3rd Cir. 1976). In a second, the court held that a defendant that was properly served with a complaint and default motion and did not contest the court's personal jurisdiction waived his rights by not appealing from the default judgment or seeking vacatur within a reasonable time after service. *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 903-06 (6th Cir. 2006) ("Significantly, appellant has never argued . . . that he lacked sufficient minimum contacts with Ohio when [plaintiff] filed the complaint or when the district court ordered the entry of judgment. Indeed, appellant could not successfully make that argument").

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[2] *See Homer v. Jones-Bey*, 415 F.3d 748, 750 (7th Cir. 2005); *Jackson*, 302 F.3d at 519; *Printed Media Servs. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993); *Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14 (3rd Cir. 1985); *Thos P. Gonzalez Corp.*, 614 F.2d at 1250; *cf. Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849 (1st Cir. 1998) (affirming denial of Rule 60(b)(4) motion where service was proper and there was no issue of minimum contacts).

Petitioners misread *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115 (2d Cir. 2008) as calling into question the "disparate treatment" of judgments, depending on whether they involved personal or subject matter jurisdiction. Pet. 14-15, 24. But *DiSapio* addressed no such thing. It held squarely that Rule 60(b)(4) may be "properly invoked to challenge lack of personal jurisdiction" where, as here, a non-appearing party with notice of an action against it suffers a default judgment. *DiSapio*, 540 F.3d at 123. It did not involve, and expressed no opinion on, the treatment under Rule 60(b)(4) of judgments rendered without subject matter jurisdiction. Nor does *DiSapio* provide any support for Petitioners' suggestion that relief under Rule 60(b)(4) should be available only if it is "inconvenient" for a defendant to appear in the judgment-rendering court, a theory that has no basis in the language of the Rule itself. Pet. 17. While *DiSapio* suggested that convenience, among other reasons, might explain the seeming anomaly of deeming an appearing party to have waived lack of personal jurisdiction by not properly asserting it in a timely motion while allowing a non-appearing party with notice to seek relief under Rule 60(b)(4), the court held that the availability of vacatur turned solely on the fundamental issue of whether the district court had personal jurisdiction over the defendant. *See DiSapio*, 540 F.3d at 124-26.

C. Rule 60(b)(4) Makes No Exception For A Defendant With Prior Notice Of The District Court Proceedings.

Petitioners also assert that the decision below is somehow inconsistent with this Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) and earlier cases. Pet. 9-11, 19, 24. However, there is no such inconsistency, much less any basis for review by this Court.

Nothing in *Espinosa* remotely supports Petitioners' position that a party's notice of an action against it, in and of itself, necessarily waives the right to raise a jurisdictional defense under Rule 60(b)(4). There, the objecting creditor, which had filed a Rule 60(b)(4) motion seeking to set aside a bankruptcy court's order confirming the debtor's plan some ten years after it received actual notice of the plan and the confirmation order, "concede[d] that the Bankruptcy Court had jurisdiction to enter the order." 130 S. Ct. at 1378. For that reason, the Court had no occasion "to define the precise circumstances in which a jurisdictional error will render a judgment void." *Id.* at 1377. The Court held only that because the petitioner voluntarily submitted itself to the bankruptcy court's jurisdiction by filing a proof of claim, and failed to object to the proposed plan (or to appeal from the confirmation order) despite actual notice, it forfeited any objections regarding the validity of service, which was a procedural issue rather than a jurisdictional one. *Id.* at 1378, 1380. Likewise, none of the other cases cited by Petitioners involved a defendant who lacked minimum contacts with the forum.

See Sanderford v. Prudential Ins. Co., 902 F.2d 897, 899-900 (11th Cir. 1990); *Wells v. Rockefeller*, 728 F.2d 209 (3rd Cir. 1984).

Even more broadly, Petitioners' position that notice alone necessarily waives the right to raise a jurisdictional defense is squarely at odds with long-settled case law, which establishes that notice, minimum contacts, and compliance with a state's long-arm statute are separate and independent requirements for personal jurisdiction. *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 105 (1987) (personal jurisdiction requires more than just notice, but also minimum contacts and authorization for service); *Shaffer v. Heitner*, 433 U.S. 186, 198 (1977) (explaining that notice and power are separate aspects of jurisdiction); *accord, e.g., SEC v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007); *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 925 n.15 (11th Cir. 2003). The theory that a jurisdictional defense may be raised under Rule 60(b)(4) only by a defendant who was unaware of the case pending against it is one that has been roundly rejected by the courts. *E.g., Practical Concepts*, 811 F.2d at 1547 (rejecting argument that vacatur should be denied because the defendant had "passed up 'numerous opportunities'" to challenge the district court's jurisdiction); *see also* cases cited at pp. 10-11, *supra*.

Finally, Petitioners argue that KGL's decision to refrain from appearing in the action against it "circumvents the policy of finality implicitly recognized by the Court's ruling in *Espinosa*." Pet. 19. Petitioners' invocation of the "policy of finality," however, is foreclosed by this Court's decision in *Gonzalez v. Crosby*,

545 U.S. 524 (2005). There, responding to a similar argument, the Court stated, "we give little weight to respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Id.* at 529. Petitioners' argument, if accepted, would render an initial jurisdictional finding final and unreviewable even if, as in the instant case, it was based on a one-sided and flawed presentation of evidence and is therefore concededly "erroneous." Pet. 11. Such an extreme result cannot be reconciled with the elementary principle that "a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa*, 130 S. Ct. at 1377.

II.

A PARTY LACKING MINIMUM CONTACTS WITH THE FORUM NEED NOT RAISE A JURISDICTIONAL OBJECTION UNDER RULE 12.

Petitioners briefly make the closely related argument that KGL was required to assert its jurisdictional defense under Rule 12(h)(1), and that by failing to do so, it waived its right to raise the issue any time thereafter. Pet. at 25-26. Thus, in Petitioners' view, Rule 60(b)(4) and Rule 12(h)(1) are in conflict with each other. That contention lacks any colorable basis, and certainly does not warrant review by this Court.

The notion that a party waives any right it may have to object to personal jurisdiction by failing to appear is

"against all federal authority." *Jackson*, 302 F.3d at 523. As the Fifth Circuit explained in rejecting a similar argument,

> True, a party's right to object to personal jurisdiction certainly is waived under Rule 12(h) if such party fails to assert that objection in his first pleading or general appearance. But a party's right to contest personal jurisdiction is not waived by his failure to appear at all. It is well-established that defendants need not appear in a federal court without authority to exercise personal jurisdiction over them to raise a jurisdictional defect.

Id. at 523 (internal quotations and brackets omitted); *see also Foster*, 278 F.3d at 414 ("Rule 12(h) contemplates an implied waiver of a personal jurisdiction defense by defendants who appear before a court," not by defendants who decline to appear and later move under Rule 60(b)(4)). Petitioners' theory would, in effect, render Rule 60(b)(4) a dead letter in any case in which a defendant with notice of the proceedings does not voluntarily appear to raise the jurisdictional defense.

Finally, *Insurance Corp. of Ireland* provides no support for Petitioners' argument that minimum contacts are not a prerequisite for personal jurisdiction where a party declines to appear and assert a defense under Rule 12. Pet. at 13, 16, 26-27. As Petitioners concede, the reason that the defendants in *Insurance Corp. of Ireland* were subject to personal jurisdiction is that—unlike here—they voluntarily appeared before

the court to contest jurisdiction. In so doing, they necessarily agreed to abide by that court's determination on that issue. *Id.* at 706. The defendants' violation of a discovery order furnished grounds for the district court to issue a sanction resolving the issue against them. *Id.* at 699. The court of appeals' decision below is entirely consistent with that holding, and presents no basis for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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